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Citizens as Legal Decision Makers: An International Perspective

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Special Issue

Introduction: Citizens as Legal Decision Makers: An International Perspective¹

Valerie P. Hans†

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Introduction

On May 1, 2007, Korea's National Assembly approved a judicial reform bill that introduces a jury system for serious criminal cases in Korean courts.² The jury system is limited: jurors will only participate in cases where the defendant agrees to a trial by jury, and the jury's verdicts are only advisory to the judge.³ Nonetheless, Korean citizens now have a

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1. This special issue of the *Cornell International Law Journal* includes a selection of papers initially presented at a conference, entitled *Citizen Participation in East Asian Legal Systems* and sponsored by the Clarke Program in East Asian Law and Culture, Cornell Law School, September 22-23, 2006. I am grateful for the generous support of the Clarke Program. The intellectual support of its director Annelise Riles and the logistical support of its administrative assistant Donna Hastings both contributed greatly to the quality of the conference.

I am also indebted to the conference presenters and attendees, who deepened my understanding of the challenges and promises of citizen participation in legal decision making in different countries. Finally, I want to acknowledge the important contributions of the Lay Participation in Law International Research Collaborative to the development of the Cornell conference and to this journal issue. The research collaborative received support from the Law & Society Association and National Science Foundation grant SES0647809.

2. *Jury Bill Gets Parliamentary Go-Ahead*, DIGITAL CHOSUNILBO (English Edition), May 1, 2007, at <http://english.chosun.com/w21data/html/news/200705/200705010023.html>. See also Eric Seao, *Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System*, 40 VAND. J. TRANSNAT'L L. 265 (2007); Kwang Bai Park et al., *Preparing the Ground: The Case of Korea*, Paper presented at Law and Society Association annual meeting, Baltimore, Maryland, July 7, 2006 (describing the important background research that the authors and other members of the Presidential Reform Commission conducted, and reporting the Presidential Reform Commission's recommendation for a jury system in Korea).

3. *Id.*

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remarkable new opportunity to make judgments about criminal trials.⁴

With this law reform, Korea joins a growing list of countries whose legal systems employ citizens as legal decision makers. The United States, Great Britain, and many other common law countries use juries composed of citizens drawn from the general population who decide cases collectively.⁵ Civil law countries also use laypersons but more typically in the role of mixed decision-making bodies with law-trained judges.⁶ Lay judges, lay magistrates, and lay courts are also part of some judicial systems.⁷ What is the significance of including citizens as legal decision makers? Do the different forms of citizen involvement matter? Do they genuinely promote democracy and meaningfully contribute to the legal system's legitimacy, or do they merely serve as window-dressing, a patina of democratic participation masking authority that lies elsewhere?

My interest in these questions has grown over many years of study of the American jury system.⁸ Over the last several decades, scholarship on the jury has flourished, including historical and comparative work as well as a growing body of empirical research on the operation of the American jury.⁹ This scholarship has fostered a growing appreciation of the importance of the unique historical, political, legal, and social contexts facilitating and constraining the jury's work. In addition, many states have modernized their jury systems; policy groups such as the American Bar Association, the American Judicature Society, and the National Center for State Courts have advocated jury trial reforms that incorporate new knowledge about human decision making.¹⁰

4. *What the New Jury System Will Mean for Korea*, DIGITAL CHOSUNILBO (English Edition), May 3, 2007, available at <http://english.chosun.com/w21data/html/news/200705/200705030023.html>.

5. NEIL VIDMAR, *WORLD JURY SYSTEMS* 3 (2000).

6. SANJA KUTNJAK IVKOVIĆ, *LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA* 17-26 (1999) [hereinafter KUTNJAK IVKOVIĆ, *LAY PARTICIPATION IN CRIMINAL TRIALS*].

7. See generally DORIS M. PROVINE, *JUDGING CREDENTIALS: NON-LAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* (1986).

8. Although there were individual efforts to study the workings of the American jury, empirical study began in earnest in the middle of the twentieth century with the Chicago Jury project, and began to expand during the 1970s, when I joined the field of jury research. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 116-20, (1986). See also NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (forthcoming 2007).

9. See Valerie P. Hans & Neil Vidmar, *Jurors and Juries*, in *BLACKWELL COMPANION TO LAW AND SOCIETY* 195 (Austin Sarat ed., 2004).

10. AMERICAN BAR ASSOCIATION, *PRINCIPLES FOR JURIES AND JURY TRIALS* (2005), <http://www.abanet.org/juryprojectstandards/principles.pdf> (last visited Mar. 1, 2007). For a systematic national study of these efforts in U.S. state courts, see GREGORY E. MIZE ET AL., *THE STATE OF THE STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT*, http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf (last visited May 11, 2007). The American Judicature Society provides recommendations for jury deliberations. *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATION*, http://www.ajs.org/jc/juries/AJSJuryDelib_04.pdf (last visited May 11, 2007). Examples of individual state reports of their jury reforms may be found at ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, *THE POWER OF TWELVE* (1993), and http://www.ajs.org/jc/juries/AJSJuryDelib_04.pdf (NEW YORK STATE JURY REFORM PROJECT) (last visited May 11, 2007).

As scholarly knowledge of jury systems has expanded, and reforms aimed at infusing new life into the American jury system have been enacted, the proportion of legal cases resolved by jury has, paradoxically, declined.¹¹ Careful research has uncovered a variety of potential causes of this trend, including the expansion of alternative dispute resolution, the perception and reality of higher litigation costs, and a change in ideology that encourages judges to settle rather than try cases.¹² The long-term and more recent declines in trials by jury raise the question of whether the jury systems in the United States and Great Britain have outlived their usefulness. If the decline continues, it is possible that the American and British juries could be relegated to symbols of democracy rather than vehicles for genuine self-government.

Thus, I have looked on with great interest as other countries have experimented in recent years with employing juries or mixed tribunals of lay citizens and law-trained judges in legal fact-finding. For example, following the oppressive regime of Franco, Spain introduced a jury system,¹³ as did Russia after the breakup of the Soviet Union.¹⁴ Other countries transitioning from communist rule to democracy have introduced mixed tribunals that include citizen decision makers.¹⁵ In addition to the Korean example, proposals for greater public access and involvement of lay citizens in the legal systems of other East Asian countries have also occurred.¹⁶ This special issue of the Cornell International Law Journal considers the promises and challenges of these multiple forms of citizen participation in legal decision making in a range of countries.

11. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460-76, 492-500, 506-515 (2004) (presenting evidence of decline in judge and jury trials over time); see also Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 691 (2004) (describing historical decline in trials as method of dispute resolution). See generally Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735, 738-48 (2004) (showing declines in Great Britain and the United States); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* (2001) (presenting evidence of decline in U.S. civil cases adjudicated by juries).

12. Galanter, *supra* note 11, at 515-20 (describing factors).

13. See generally Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241 (1998).

14. See generally Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995). See also Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT'L L.J. [](2007) [hereinafter Thaman, *Nullification*].

15. IVKOVIĆ, LAY PARTICIPATION IN CRIMINAL TRIALS, *supra* note 6, at 107 (describing mixed tribunals in Croatia).

16. See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. [](2007). See also Masahiro Fujita, *Planning for Lay Participation in Japan: Ideas from Research*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, Sept. 22-23, 2006; Takashi Maruta, *Of Saiban-in Seido and Criminal Trial in Japan: Idea and Reality of the Japanese Lay-Judges System*, Paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, Sept. 22-23, 2006.

I. Potential Benefits of Citizen Participation

The emergence of jury-like systems in newly-liberated states and in countries with pro-democracy initiatives suggests that reformers anticipate political benefits from incorporating citizens into the legal decision-making apparatus. Likewise, it indicates that these new democracies perceive political hazards in limiting legal decision making to a narrow, elite, professionally trained slice of the public. Although the links between direct participation in legal decision making and broader social and political benefits have not been fully explored, there are good theoretical reasons to believe that citizen participation in the legal arena promotes democracy. Direct involvement of citizens is said to enhance the legitimacy of the legal system, making it more responsive to community values.¹⁷

Long ago, the French political thinker Alexis de Tocqueville expressed admiration for the American jury and the way it educated the citizenry about self-government.¹⁸ Tocqueville declared, "The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government."¹⁹ The virtues of jury duty were thus viewed as both *informative*, through educating the populace about important legal ideas, and *transformative*, by more tightly binding the citizen to the state. Similar justifications have been made for the inclusion of citizens in mixed decision making bodies.²⁰

Supporting the value of jury participation in the United States, jury service appears to produce more public support for the courts and the legal system. Post-trial surveys of jurors routinely find that jurors are more positive about the courts and the jury system after their service than before.²¹ For example, a national survey of over 8,000 jurors who served in sixteen federal and state courts found that the majority (63%) said that their impression of jury duty was more favorable after serving.²² Other studies show that jurors are more likely to see the courts as fair, assessing the justice and equity of the legal system more favorably.²³

17. See generally JAMES P. LEVINE, JURIES AND POLITICS (1992). See also Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37 (1992); Richard O. Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, ST. LOUIS-WARSAW TRANSATLANTIC L. J. 1, 9-10 (2002).

18. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 331-39 (Henry Reeve trans., Schocken Books 1961) (1835).

19. *Id.* at 336-37.

20. KUTNJAK IVKOVIĆ, LAY PARTICIPATION IN CRIMINAL TRIALS, *supra* note 6, at 31-62 (describing benefits attributed to lay participation).

21. Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 284-86 (Robert E. Litan ed., 1993).

22. *Id.* at 285.

23. *Id.* at 286.

The Jury and Democracy Project, organized by a multidisciplinary team of researchers, has conducted research demonstrating the salutary effects of jury service on civic participation.²⁴ The Project's work on jury service was inspired by a movement in political science on "deliberative democracy," the idea that citizen participation in face-to-face debates over political issues offers a core method of promoting meaningful civic engagement.²⁵

In two studies of the link between jury service and other forms of political participation, the Jury and Democracy Project researchers found that participation as a juror results in greater civic engagement. In the first study, the researchers gathered information about voting frequency for nearly eight hundred residents of Thurston County, Washington who were empanelled as criminal jurors. Controlling for past voting frequency, the analysis found that jurors who served on a criminal jury and reached a verdict voted more frequently in subsequent elections than jurors who were dismissed, were alternates, or were on hung juries that could not reach a verdict.²⁶

A second, expanded test of the link between jury service and political participation examined court and voting records in seven additional counties across the United States. The final combined dataset included more than 13,000 jurors.²⁷ This large sample size enabled researchers to determine whether the initial findings generalized to other locations and to explore the impact of different types of jury experiences. It also allowed them to remove those jurors who either never or always voted, permitting a more sensitive testing of the hypothesized link between jury duty and voting. Jurors who previously had voted infrequently and who served on a criminal jury that deliberated—whether the jury reached a verdict or was declared hung—were significantly more likely to vote after their jury service. Frequent voters, and jurors in civil trials, did not change their voting behavior.²⁸ Thus, the research shows that a significant and meaningful deliberative experience appears to be critical to the promotion of other forms of civic engagement.

In addition to citizen participation's effects on democratic government, a number of scholars have identified another key benefit to jury-like systems. The involvement of a representative group of citizens is seen as an important element contributing to sound decision making.²⁹ The diversity

24. *The Jury and Democracy Project*, <http://depts.washington.edu/jurydem/index.html> (last visited March 10, 2007).

25. See generally *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY* (John Gastil & Peter Levine eds., 2005).

26. John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation*, 64 J. POLITICS 585, 591-92 (2002).

27. John Gastil et al., *Jury Service and Electoral Participation: A Strong Test of the Participation Hypothesis* 13-15 (2005), available at <http://depts.washington.edu/jurydem/JuryServiceAndElectoralParticipation.pdf> (last visited March 10, 2007).

28. *Id.* at 17-18.

29. JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99-101 (Harvard University Press 1994); see also VIDMAR & HANS, *supra* note 8.

of viewpoints and the opportunity to deliberate increase the likelihood that trial evidence will be thoroughly evaluated, and that rival explanations will be examined in the process of arriving at a decision.³⁰ Jury verdicts are well-grounded in the evidence and affirmed by legal experts. Substantial research by jury scholars confirms that the substantial majority of jury verdicts in the United States appear to be soundly based on the trial evidence. Further, legal experts, such as the presiding judge, typically agree with jury verdicts in most trials.³¹ Disagreements with legal experts appear to be due to the jury's infusion of community values, one of the major justifications for trial by jury in the American system. For example, one key finding is that judges appear to require less evidence to convict than do juries, who appear to have a more expansive view of the concept of reasonable doubt.³² All the work on mixed tribunals thus far confirms that lay citizens are highly likely to agree with the legal expert judges who decide cases with them.³³ Thus, the inclusion of lay members in mixed tribunals can, like juries, offer a fresh perspective on the matters at trial.³⁴

II. Potential Challenges of Citizen Participation

The benefits flowing from the inclusion of untutored judgment may simultaneously generate liabilities. As law became increasingly professionalized in England and the United States during the nineteenth century, and as cases and evidence became more complex during the twentieth century, observers began to question whether untrained citizens were desirable as fact finders.³⁵ Why should ordinary citizens decide cases when there were well-educated lawyers and experienced judges to handle these complexities? Even though subsequent empirical research confirmed that many of the alleged deficiencies of the jury system were overblown,³⁶ observers expressed concern that a lack of legal knowledge would lead citizen decision makers to reach verdicts based on their personal attitudes rather than legal requirements. Such criticism has been strongest against civil juries in

30. Phoebe Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989) (describing benefits of diversity on the jury). Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006) (demonstrating fact-finding benefits of racial diversity).

31. See generally HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). See also Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEG. STUD. 171-206 (2005); Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33, 33-50 (2003).

32. Eisenberg et al., *supra* note 31, at 194-96.

33. See generally Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. [](2007) [hereinafter Kutnjak Ivković, *Mixed Tribunals*].

34. *Id.*

35. See generally JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* (2006); see also Albert Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States*, 61 CHI. L. REV. 867 (1994).

36. See generally VIDMAR & HANS, *supra* note 8.

the United States; indeed, many other countries have abandoned the civil jury for precisely these reasons.³⁷

At first blush, lay members of mixed decision making bodies might be less susceptible to such criticism aimed at the jury. If lay participants on mixed tribunals are ignorant of the law or voice arguments based on passion or prejudice, the law-trained members of the mixed tribunal can inform and direct them in those instances. Thus, the specific form of lay participation offers an apparent remedy to a major criticism of it. However, combining lay and law-trained judges in a single decision making body poses another inherent challenge: the real possibility of domination by the legal expert. If the law-trained judge controls the proceedings and deliberations and does not encourage input from lay members, then citizen participation would be mere window-dressing, unjustly enhancing the legitimacy of the legal system without assuring meaningful input.³⁸ In sum, the law-trained judge's presence within a mixed tribunal diminishes concerns about lay competence but simultaneously raises the prospect that lay participants will have little opportunity to voice any distinctive views or affect the decision.

III. Cornell Law School Conference on Citizen Participation in East Asian Legal Systems

A conference held at Cornell Law School in September 2006, sponsored by the Clarke Program in East Asian Law and Culture, examined the changing role of the citizen within East Asian legal systems, drawing on a wealth of knowledge gained from studying citizen participation in law both comparatively and historically.³⁹ Surely, it was an opportune time to discuss citizen participation. Decades of research on juries and on the functioning of mixed tribunals, including recent experiments introducing citizen participation, are now available for review and assessment. More significantly, East Asian countries—most notably Japan and Korea—will introduce citizen participation in law. The conference offered the opportunity to exchange theoretical ideas, research agendas, and evaluate the experiences of various countries with citizen participation in law.

The Cornell conference included scholars studying developments in Japan, Korea, China, and Thailand. It also offered a broad comparative perspective, incorporating insights from citizen participation in other his-

37. See OLDHAM, *supra* note 35. A summary of criticisms of the American civil jury may be found in Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248 (Robert E. Litan ed., 2003). For an account of the decline of the jury, including civil juries, in Great Britain, see Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in WORLD JURY SYSTEMS 53 (Neil Vidmar ed., 2000).

38. See generally Kutnjak Ivković, *Mixed Tribunals*, *supra* note 33.

39. Cornell Law School Conference on Citizens Participation in East Asian Legal Systems, Cornell Law School, Sept. 22-23, 2006, http://www.lawschool.cornell.edu/research/lay_participation_in_law/international_research.cfm (last visited March 10, 2007).

torical periods, such as the early development of trial by jury in England,⁴⁰ as well as in other countries and regions like Russia and Europe.⁴¹ The conference built on the sound foundation developed at a previous international meeting in Siracusa, Italy organized by Professor Stephen Thaman, one of the Cornell participants.⁴² At the Siracusa conference, entitled *Lay Participation in the Criminal Trial in the Twenty-First Century*, scholars, judges, and lawyers from more than twenty-eight countries gathered to exchange information about the uses of lay citizens in criminal justice decision making worldwide.⁴³ Further foundational work was accomplished in regular meetings of a collaborative research network devoted to the study of lay participation in legal decision making.⁴⁴

The four articles in this special issue of the Cornell International Law Journal, along with Professor Richard Lempert's insightful commentary, provide a sampling of key issues and questions that emerged during the Cornell conference. Reasonably, some comparative law scholars question the desirability of, and comment on the uncertainty of success in, importing a common law, western legal institution like the jury into distinct legal and political systems.⁴⁵ Does the possibility or actuality of participation fundamentally change the relationship of the citizen to the justice system, or even the citizen to the state? If so, is this an invariant relationship, or does it critically depend on the political, economic, and social context?

Frank Munger's article provides an excellent theoretical framework for examining global dissemination of western legal ideas and institutions to other countries, including citizen participation in law.⁴⁶ He warns that a regular finding of comparative socio-legal scholarship is that efforts to transplant western regulatory and judicial regimes, even if successfully instituted in other regions of the world, may operate in wholly unexpected and distinctive ways.⁴⁷ Munger uses as an example the case of Thailand's

40. Bernadette Meyler, *The Trials and Tribulations of the English Jury: Some Lessons for Emergent Systems of Lay Participation*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, Sept. 22-23, 2006.

41. See generally Thaman, *Nullification*, *supra* note 14. See also Kutnjak Ivković, *Mixed Tribunals*, *supra* note 33.

42. Steven C. Thaman, *The Jury's Role in Administering Justice in the U.S.: An Introduction to Saint Louis Public Law Review Jury Issue*, 21 ST. LOUIS U. PUB. L. REV. 3, 4 (2002) (describing Siracusa conference) [hereinafter Thaman, *Jury's Role*].

43. *Id.* Papers from the conference were published in special issues of law reviews and in a book: JUICIO POR JURADOS EN EL PROCESO PENAL (Ruben O. Villela ed., 2000) (relating to reforms in Spain and Argentina); 73 REVUE INTERNATIONALE DE DROIT PENAL (First and Second trimesters 2001) (relating to European, African, and Asian countries); and Thaman, *Jury's Role*, *supra* note 42 (describing the U.S. jury system).

44. Collaborative Research Network sponsored by the Law & Society Association, <http://www.lawandsociety.org/CRN/crn4.htm> (last visited Apr. 24, 2007).

45. See generally Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002) (identifying cultural differences between the United States and European countries that are reflected in distinctive trial procedures, including the presence of the civil jury, the role of the judge, and party control over experts).

46. Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40 CORNELL INT'L L.J. [..](2007).

47. *Id.*; see also SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING HUMAN RIGHTS INTO LOCAL JUSTICE* (2006).

remarkable "People's Constitution," dating to 1997, which promoted the rule of law, democracy, and citizen self-governance.⁴⁸ It was thought to usher in a new era in Thailand, heralding the end of Thailand's checkered history of military coups. Yet, during the very week of the Cornell conference of September 2006, the Thai military took power in another successful coup and repealed the Constitution.⁴⁹ Munger shows us the complexity of thinking about citizens' rights and participatory democracy when the cultural expectations about the possibility of radical political change are so different.

Munger warns that Asian cultures and their distinctive traditions and socialization practices may militate against citizen participation. Consider the jury, which removes people from their personal connections with others and places them into decision making bodies of strangers under conditions of formal equality. Is this an appropriate model for Thailand? Munger thinks there is a mismatch.⁵⁰ Yet, in several specialized courts, Thailand has incorporated lay judges with expertise in substantive areas, where they decide cases along with law-trained judges, a phenomenon worthy of systematic examination.⁵¹

A more optimistic picture of the prospect of citizen participation in Asian countries is provided by Hiroshi Fukurai's article in this issue. Professor Fukurai and other Japanese scholars spoke at the Cornell conference about Japanese legal changes, enabling the introduction in 2009 of Saiban-in Seido, a mixed tribunal of three professional judges and nine randomly selected citizens, which will decide serious criminal cases.⁵² Fukurai is particularly interested in the prospect that citizen participation in Japan will affect citizens' legal consciousness and support for the Japanese legal system. His focus on legal consciousness overlaps with the Jury and Democracy Project's aim to promote civic engagement through meaningful citizen participation in the legal system.

Professor Fukurai treats us to a fascinating story of how scholars and attorneys organized to promote the idea of citizen participation in Japan through the mechanism of the jury. The movement grew slowly at first, but it eventually expanded to include a wider range of lawyers and policy makers, eventually resulting in the adoption, not of a Japanese jury system, but of the mixed tribunal system of Saiban-in Seido. Fukurai describes the debate over the form of citizen participation. He also examines another new Japanese institution which could prove to have an even greater democratizing impact, a Prosecutorial Review Commission (PRC) system composed of lay citizens that functions in ways similar to those of a grand jury. Comparing a sample of PRC members and American jurors, Fukurai finds substantial overlap in their greater confidence in, and support for, the legal

48. Munger, *supra* note 46, at [INSERT PIN CITE] (citing Constitution of the Kingdom of Thailand, B.E. 2540 (1997)).

49. *Id.* at [INSERT PIN CITE].

50. *Id.* at [INSERT PIN CITE].

51. *Id.* at [INSERT PIN CITE].

52. See generally Fukurai, *supra* note 16.

system. He offers insightful recommendations on how Saiban-in Seido might practically function in light of the unique characteristics of Japanese legal consciousness.

In her article, Sanja Kutnjak Ivković provides more advice about methods for promoting meaningful lay participation in mixed tribunals.⁵³ Mixed tribunals have long been in use in several western democracies as well as former socialist countries, many of which rely on civil law rather than common law. Kutnjak Ivković draws on the limited but fairly consistent research to confirm the major disadvantages of mixed tribunals: the domination of the professional judges and the minimal participation by lay judges.⁵⁴ Many verdicts are unanimous, and lay judges usually agree with the professionals. That is not surprising given the strong overlap between American judges and juries, but what is more worrisome is the evident failure of lay judges in mixed tribunals to follow the trial closely, ask questions, and contribute to the deliberations. Using status characteristics theory, Kutnjak Ivković provides a trenchant theoretical analysis of the mechanisms by which professional judges with higher status come to have disproportionate influence in the mixed tribunal.

Insights about these group dynamics, derived from both small group theory and research into the functioning of mixed tribunals, also suggest some recommendations about how to maximize the input of lay judges. Suggestions include giving lay judges sufficient time to study the case file in advance of the trial and encouraging their active participation. Here the professional judge's support for lay participation can be critical.

Stephen Thaman's analysis of the first decades of the modern Russian jury trial, reintroduced in 1993, offers the sobering conclusion that weaknesses in its implementation have nullified the right to an independent jury in Russia.⁵⁵ Russian trial courts had long used a lay assessor system in which one professional judge decided cases together with two people's assessors.⁵⁶ The introduction of the Russian jury was associated with a variety of seemingly democratic reforms enacted as the Soviet Union was being dismantled. At the time, there was much excitement and anticipation about the jury and its ability to avoid the domination of the professional judge that characterized the "noddors," the derogatory name for the overly agreeable people's assessors.

Thaman's extensive and detailed presentation of the use of Russian juries is a major contribution to our understanding of how a democratic institution like the jury can, nonetheless, be effectively undermined through particular legal features and requirements. In Thaman's eyes, a key factor diminishing the jury's ability to speak independently includes the ability of trial judges to return cases containing insufficient evidence for conviction to the prosecutor for further investigation, even where juries

53. Kutnjak Ivković, *supra* note 33.

54. *Id.* at [INSERT PIN CITE].

55. Thaman, *Nullification*, *supra* note 14.

56. *Id.* at [INSERT PIN CITE]; see generally Stefan Machura, *Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia*, 25 *LAW & POL'Y* 123 (2003).

had already begun to hear the cases. Likewise, appeals courts have the ability to overturn jury acquittals, which the courts do quite frequently, and the case may be retried to a new jury. Another problematic element, Thaman asserts, is that juries must answer specific questions, similar to interrogatories in American civil trials, and the structure of these questions and answers not only remove the jury's ability to return a general verdict but also provide ample opportunity for error to be found. All these features make the jury's decision quite apt to be disturbed.

Like Kutnjak Ivković, Thaman draws on empirical research to suggest strategies to improve the jury's function. Modification of appellate jurisdiction is required, and the verdict form must be simplified. His findings, however, also remind us of Professor Munger's point about the importance of the political, economic, and social context, which may facilitate or constrain citizens' effective participation as legal decision makers.

IV. Looking Forward: Developing A Research Agenda

Collectively, the articles in this special issue suggest some of the important topics that must be included in any comprehensive research agenda—theoretical issues and empirical questions that we must explore to understand the phenomenon of citizen participation in legal decision making. They help to identify key questions and offer a host of research-based suggestions for the introduction of citizen participation in law. Drawing on the research implications of the articles, Professor Richard Lempert provides insightful commentary in this issue.⁵⁷ He urges us to develop a taxonomy of the power of lay adjudicators in legal decision making systems around the world.

Mindful of comparative theory and research on the transplanting and borrowing of legal ideas and forms, we must ask how institutional arrangements that include citizens as legal decision makers are likely to interact with the preexisting cultural, political, and economic traditions as well as assumptions of diverse countries. The mechanisms by which jury participation enhances civic engagement are not yet completely understood, even within the United States where new research has confirmed that jury service increases electoral participation. What features of citizen participation are essential to promote such a relationship? Is it unique to the United States or, as Fukurai suggests, is it eminently able to be generalized to other countries? Could deliberating with elite and powerful judges foster the same heightened attachment to civic life as deciding a case exclusively with other lay citizens?

Lempert also encourages careful empirical work on the distinct forms of lay participation, so that researchers can develop a clear sense of how they might work in practice and what characteristics promote meaningful lay voices. Several participants at the Cornell conference described exciting new empirical research programs on citizen participation, including

57. Richard Lempert, *The Internationalization of Lay Legal Decision Making: Jury Resurgence and Jury Research*, 40 *CORNELL INT'L L. J.* [..](2006).

studying the attitudes of the public and legal elites, examining the early impacts of introducing lay participation, and doing exploratory studies to forecast the likely effects within a particular country.⁵⁸ Innovative programs in Korea and Japan have used a mock jury paradigm to examine the way in which professional and lay judges communicate within a mixed tribunal deliberation,⁵⁹ and how citizens comprehend novel and complicated legal terms that are not part of the lay lexicon.⁶⁰ These important and timely exploratory projects, as well as the insightful articles in this special issue, are excellent illustrations of the ways in which comparative sociolegal research can inform the policy process.

58. Min Kim, *Research on Juries versus Mixed Tribunals in Korea*, paper delivered at the Cornell Law School Conference on Citizen Participation in East Asian Legal Systems, Sept. 22-23, 2006; see also Fujita, *supra* note 16.

59. See generally Kim, *supra* note 58.

60. See generally Fujita, *supra* note 16.